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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 EDWARD VILLA,

11 Petitioner,

12 v.

13 M.S. EVANS, Warden,

14 Respondent.

Civil No.07cv0032 JAH (JMA)

ORDER ADOPTING REPORT AND
RECOMMENDATION AND
DENYING PETITIONER'S
MOTION TO STAY [Doc. No. 8]

15 INTRODUCTION

16 Petitioner, a state prisoner proceeding *pro se*, filed a petition for writ of habeas
17 corpus pursuant to 28 U.S.C. § 2254. Pending before the Court is Petitioner's motion
18 to stay and the report and recommendation ("Report") filed by the Honorable Jan M.
19 Adler, United States Judge, recommending the motion to stay be denied. After careful
20 consideration of the pleadings and relevant exhibits submitted by the parties, and for
21 the reasons set forth below, this Court **ADOPTS** the magistrate judge's Report in its
22 entirety and **DENIES** the motion to stay.

23 BACKGROUND

24 Petitioner was convicted, on October 21, 2003, of one count of first degree
25 murder with personal use of a firearm and assault with a deadly weapon. Petition at 1.
26 The jury also found the gang enhancements true. *Id.*; Court of Appeal Decision, Exh.
27 A at 2. The trial court imposed a term of 25 years to life for murder, 25 years to life
28 for personal discharge of a firearm causing death, a 4 year term for assault and a 5 year

1 gang enhancement. See Exh. A at 2. Petitioner appealed his conviction to the Court of
2 Appeal, Fourth Appellate District, State of California, asserting eleven grounds for
3 relief. See Exh. B. The Court of Appeal affirmed the conviction on May 4, 2005.
4 Petitioner filed a petition for review with the California Supreme Court asserting four
5 claims for relief. See Exh. C.

6 Petitioner filed the instant petition for writ of habeas corpus in this Court on
7 January 3, 2007, along with a motion to proceed *in forma pauperis*. Plaintiff alleges five
8 grounds for relief. In his fifth claim, Petitioner alleges he was denied the right to
9 confront and cross-examine witnesses and due process when the trial court allowed
10 hearsay testimony in violation of his Sixth and Fourteenth Amendment rights. See
11 Petition at 10. He fails to allege he exhausted the fifth claim for relief. Judge Adler
12 granted the motion to proceed *in forma pauperis* and notified Petitioner of possible
13 dismissal of his petition for failure to exhaust a claim. See Doc. No. 3. Petitioner was
14 given four options to proceed with his petition. On April 18, 2007, Plaintiff filed the
15 pending motion to stay. See Doc. No. 8. Respondent filed an opposition on May 18,
16 2007. Petitioner did not file a reply. Pursuant to 28 U.S.C. § 636(b)(1), Judge Adler
17 submitted a report and recommendation (“Report”) to this Court recommending
18 Petitioner’s motion to stay be denied.

19 Objections to the Report were due by August 31, 2007. Petitioner filed a
20 document entitled “Objections to the Report and Recommendations” on October 10,
21 2007. See Doc. No. 14. However, a review of the document demonstrates there are no
22 objections to the Report. Plaintiff specifically states he has “no objections to the
23 Court’s descision [sic] to deny [his] motion to request to ‘stay federal proceedings.’”
24 Doc. No. 14 at 1. He further states he will start over and refile a new petition for writ
25 of habeas corpus. Id.

26 DISCUSSION

27 The district court’s role in reviewing a magistrate judge’s report and
28 recommendation is set forth in 28 U.S.C. § 636(b)(1). Under this statute, the district

1 court “shall make a *de novo* determination of those portions of the report . . . to which
 2 objection is made,” and “may accept, reject, or modify, in whole or in part, the findings
 3 or recommendations made by the magistrate [judge].” *Id.* When no objections are
 4 filed, the Court may assume the correctness of the magistrate judge’s findings of fact
 5 and decide the motion on the applicable law. Campbell v. United States Dist. Court,
 6 501 F.2d 196, 206 (9th Cir. 1974); Johnson v. Nelson, 142 F. Supp. 2d 1215, 1217
 7 (S.D. Cal. 2001). Under such circumstances, the Ninth Circuit has held that “a failure
 8 to file objections only relieves the trial court of its burden to give *de novo* review to
 9 factual findings; conclusions of law must still be reviewed *de novo*.” Barilla v. Ervin, 886
 10 F.2d 1514, 1518 (9th Cir. 1989) (citing Britt v. Simi Valley Unified Sch. Dist., 708
 11 F.2d 452, 454 (9th Cir. 1983)).

12 Although Petitioner filed a document entitled objections to the report and
 13 recommendation, Petitioner does not object to the Report. Thus, the Court received
 14 no objections or requests for extensions of time to file objections. As such, the Court
 15 assumes the correctness of the magistrate judge’s factual findings and adopts them in
 16 full. The Court has conducted a *de novo* review, independently reviewing the Report
 17 and all relevant papers submitted by both parties, and finds that the Report provides a
 18 cogent analysis of the issues presented in the motion. Specifically, this Court agrees
 19 that Petitioner failed to show good cause for his failure to exhaust as required. See
 20 Rhines v. Weber, 544 U.S. 269, 275 (2005). In fact, Petitioner provides no
 21 explanation for failing to exhaust his fifth claim. Therefore, this Court adopts the
 22 magistrate judge’s findings and conclusions presented in the report.

23 CONCLUSION AND ORDER

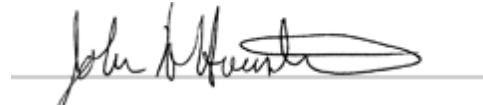
24 For the reasons set forth above, **IT IS HEREBY ORDERED** that:

- 25 1. The findings and conclusions of the magistrate judge presented in the
 26 Report are **ADOPTED** in their entirety;

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2. Petitioner's motion to stay is **DENIED**.

DATED: November 29, 2007



HON. JOHN A. HOUSTON
United States District Judge